

# **EXHIBIT A**

**Redacted**

**In The Matter Of:**  
*Spangler Candy Company v.*  
*Tootsie Roll Industries, LLC*

---

*Kirk Vashaw*  
*October 8, 2018*  
*Video Deposition*

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Original File Kirk Vashaw 10-12-18.txt  
Min-U-Script® with Word Index

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1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF OHIO  
3 WESTERN DIVISION  
4 SPANGLER CANDY COMPANY, )  
5 )  
6 Plaintiff, )  
7 vs. ) Case No. 3:18-CV-1146  
8 TOOTSIE ROLL INDUSTRIES, ) Judge Helmick  
9 LLC., )  
10 Defendant. ) CONTAINS CONFIDENTIAL  
11 ) INFORMATION - ATTORNEYS'  
12 ) EYES ONLY  
13  
14 VIDEO RECORDED DEPOSITION OF KIRK VASHAW  
15  
16 DATE: October 12, 2018 at 9:32 a.m.  
17 PLACE: Shumaker, Loop & Kendrick  
18 1000 Jackson Street  
19 Toledo, Ohio  
20 REPORTER: Casey G. Schreiner, RMR-RDR  
21 Notary Public  
22  
23  
24

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1 APPEARANCES:  
2 On behalf of the Plaintiff:  
3 SHUMAKER, LOOP & KENDRICK:  
4 David W. Wicklund  
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7 (419) 321-1213  
8  
9 On behalf of the Defendant:  
10 WOLF, GREENFIELD & SACKS, P.C.:  
11 John Strand  
12 600 Atlantic Avenue  
13 Boston, Massachusetts 02210  
14 (617) 646-8000  
15  
16 ALSO PRESENT:  
17 Kerrie Montgomery, Videographer  
18  
19  
20  
21  
22  
23  
24

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1           **THE VIDEOGRAPHER:** We are going on  
2           the record. This is the start of the  
3           video recorded deposition of Kirk Vashaw  
4           in the matter of Spangler Candy Company  
5           vs. Tootsie Roll Industries.  
6           This deposition is being held at  
7           Shumaker, Loop & Kendrick on October  
8           12th, 2018, at approximately 9:15 a.m.  
9           My name is Kerrie Montgomery with  
10          O'Brien & Levine Court Reporting. The  
11          court reporter today is Casey Schreiner  
12          with O'Brien & Levine Court Reporting.  
13          Will counsel please state their  
14          appearances and who they represent for  
15          the record.  
16          **MR. WICKLUND:** David Wicklund  
17          representing Spangler Candy Company, the  
18          plaintiff.  
19          **MR. STRAND:** John Strand from  
20          Wolf, Greenfield & Sacks representing  
21          Tootsie Roll Industries, LLC, the  
22          defendant.  
23          **THE VIDEOGRAPHER:** Will the  
24          court reporter please swear in the

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1           witness.  
2           **KIRK VASHAW,**  
3           a Witness herein, called by the Defendant as if upon  
4           Examination, was by me first duly sworn, as  
5           hereinafter certified, deposed and said as follows:  
6           **EXAMINATION**  
7   **BY MR. STRAND:**  
8       Q.    Good morning, Mr. Vashaw.  
9       A.    **Good morning.**  
10      Q.    Am I pronouncing that correctly?  
11      A.    **Right.**  
12      Q.    First I want to go over some rules of  
13      the road for today if that's okay. First, I'll be  
14      asking a series of questions obviously, and you'll be  
15      answering. Please let me finish my question before  
16      you answer so the court reporter can get everything  
17      down and so the videotape doesn't get messed up.  
18            Do you understand?  
19      A.    **I do.**  
20      Q.    Okay. And I'll give you the same  
21      courtesy, let you finish your answer before I ask the  
22      next question.  
23            Is there any reason you couldn't give  
24      true and accurate testimony today?

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1       A.    **No.**  
2       Q.    And you understand, as you were just  
3       sworn, that you're under oath today as if you would be  
4       testifying before a judge or jury?  
5       A.    **I understand.**  
6       Q.    This is your deposition. If you need a  
7       break, please let me know at any time. I'll just ask  
8       that you answer the question that was pending at the  
9       time.  
10      A.    **Okay.**  
11      Q.    You're entitled to clear questions. I  
12      sometimes, as Casey unfortunately knows, speak too  
13      quickly, and can combine my words. If you don't  
14      understand my question, please ask me to rephrase; if  
15      you don't understand what it means, please ask me to  
16      rephrase and I'll do my best.  
17      A.    **Okay.**  
18      Q.    But if you do answer a question, I'm  
19      going to assume that you understood it. Okay?  
20            Have you ever been deposed?  
21      A.    **No.**  
22      Q.    You understand you're here appearing in  
23      your personal capacity, as Mr. Vashaw, and also a  
24      representative on behalf of Spangler?

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1       A.    **Yes.**  
2            **(Court Reporter marked**  
3            **Defendant's Exhibit 7.)**  
4            **MR. STRAND:** And I'll show you  
5            what's been marked as Exhibit 7 for this  
6            deposition.  
7            And for the record, this is  
8            Defendant Tootsie Roll Industries' First  
9            Notice of Rule 30(b)(6) Deposition of  
10          Spangler Candy Company.  
11      **BY MR. STRAND:**  
12      Q.    Have you seen this before?  
13      A.    **I don't know that I have.**  
14      Q.    And I'll have you turn to about four  
15      pages in. There's something attached that says  
16      Schedule A on the top.  
17      A.    **Okay.**  
18      Q.    I was just wondering if you'd seen the  
19      topics that are listed at the bottom of this page and  
20      the next.  
21      A.    **Yes. I think I've seen, maybe not this**  
22      **exact list, but something very similar.**  
23      Q.    Okay. And in order to testify on behalf  
24      of Spangler today, did you talk with any individuals

1 following that I don't think any of the other  
2 lollipops have.  
3 I mean, they have some more flavors, but  
4 ours is a well-known brand, and people -- people  
5 remember the flavors from being kids. So there's that  
6 kind of a nostalgic attribute of the brand so ...  
7 Q. Anything else?  
8 A. The question was --  
9 Q. The --  
10 A. The question what sets Dum-Dums apart  
11 from the other ones?  
12 Q. In particular from Charms Mini Pops.  
13 A. I think our quality is better. The  
14 manufacture -- I believe the manufacturing process is  
15 different, and so we have a higher quality. The pop  
16 itself is higher quality. I think -- so those are the  
17 main ones.  
18 Q. What -- forgive my ignorance on this.  
19 But what sets apart -- what do you consider to be a  
20 high quality mini pop versus a lower quality mini pop?  
21 A. The opaqueness of it. I believe  
22 lollipops should be opaque and not as translucent.  
23 And our Dum-Dums are more opaque, so there's more kind  
24 of color to them.

1 In my opinion, the Tootsie Pops -- or  
2 excuse me, the Charms Mini is more translucent. So  
3 you can kind of look into the pop, so it looks  
4 cheaper. This is just my kind of personal -- this is  
5 my opinion.  
6 Certainly the easy -- the ease of  
7 opening the wrap is a very important attribute for  
8 Dum-Dums. And I think, again, for the other  
9 lollipops, wraps that are hard to open makes it a  
10 lower quality product in the eyes of consumers, in my  
11 opinion.  
12 Q. And the ease of the opening wrap is  
13 caused due to the -- what Dum-Dums refers to as its  
14 sashay-type wrap?  
15 A. Correct, correct.  
16 Q. And, if anything, what are the  
17 competitive differences between the Chupa Chups pops  
18 and Dum-Dums?  
19 A. I don't think Chupa Chups are allergen  
20 free. I don't know that for a fact. Chupa Chups  
21 wraps are definitely very hard to open. Chupa Chups  
22 doesn't have the brand awareness in the United States  
23 that Dum-Dums do, so people are not as familiar with  
24 the flavors.

1 Q. How do you perceive Chupa Chups'  
2 quality?  
3 A. I think the look -- you know, it's been  
4 a while since I actually looked at one of the pops,  
5 because they're not widely distributed.  
6 But I think the pop itself is similar in  
7 terms of its appearance. So, again, I would give  
8 Chupa Chups, in terms of quality, the wrap is very  
9 difficult to open, like I said.  
10 Q. Are Chupa Chups sold in some same stores  
11 as Dum-Dums?  
12 A. Not a lot. They do not have much  
13 distribution.  
14 Q. But there are some competitive overlap?  
15 A. Yes, some, but it's very little.  
16 Q. Does Spangler know what percentage of  
17 Dum-Dums' consumers actually see the bag in which  
18 Dum-Dums come?  
19 A. Can you define "consumer"?  
20 Q. Sure. So I know when I go to the bank  
21 or go to get my hair cut and my son gets his hair cut,  
22 there's Dum-Dums there, and I never see the packaging  
23 it comes in besides the wrapper, obviously, the actual  
24 bag. And I consider myself the consumer of the pop --

1 A. Right.  
2 Q. -- because it's there. What  
3 percentage -- do you know what percentage of people  
4 actually consuming the end pop actually see the bags?  
5 A. I mean, I don't know that. I would just  
6 be guessing. We consider consumers the people that  
7 are actually paying money to buy the bag itself, of  
8 which then -- or the product.  
9 Q. Uh-huh.  
10 A. And, you know, probably, I don't know, I  
11 think you'd have to look at the numbers in here. But  
12 roughly 80 percent or above of our total Dum-Dums  
13 sales are in that kind of traditional red bag.  
14 We have some other items that are not  
15 necessarily in bags, but they're similar -- similar  
16 look to the bags.  
17 Q. Like the boxes?  
18 A. Yeah, the boxes, and we have some tubs,  
19 and I think they look -- they were listed in here,  
20 like a thousand-count tub. It's not a bag, but it's  
21 got a similar -- similar look to it.  
22 So for the people that actually purchase  
23 it, it's, you know, above 80 percent, I think, would  
24 recognize kind of the look -- the look of Dum-Dums.

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1 kind of business type of candy. So we sell our  
2 lollipops, Dum-Dums, Saf-T-Pops. We also sell some  
3 other types of called give-away candy. Smarties is  
4 one of those. We sell mints, things like that.  
5 Q. Okay.  
6 A. That's not so much -- that's not so much  
7 a partnership versus we just buy product from them to  
8 resell it on our website.  
9 Q. Gotcha. Anyone else you can think of in  
10 the hard candy area that uses red, besides Smarties?  
11 A. I can't think of any. I mean, I  
12 wouldn't be surprised if there is somebody, but I  
13 don't -- I can't think of it off the top of my head.  
14 Q. And candy, generally, you understand  
15 that there's other companies that use red as their  
16 packaging --  
17 A. Yes.  
18 Q. -- such as Twizzlers --  
19 A. Twizzlers, yes. Skittles.  
20 Q. Kit-Kat.  
21 A. Is Kit-Kat red? I know that there are,  
22 yes.  
23 Q. Maybe not the same Pantone color of red,  
24 but a red shade.

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1 A. Yeah, of course.  
2 MR. STRAND: Go to interrogatory  
3 No. 2 response on page 3 of Exhibit 8.  
4 And just for ease, too,  
5 actually ...  
6 (Court Reporter marked  
7 Defendant's Exhibit 9.)  
8 BY MR. WICKLUND:  
9 Q. Mr. Vashaw, you've been handed what's  
10 been marked as Exhibit 9, and this is a document that  
11 was filed along with Spangler's motion for preliminary  
12 injunction as a document at ECF 17-2 in this matter.  
13 Do you recognize this as your  
14 declaration?  
15 A. Yes.  
16 Q. And then there is a series of exhibits  
17 appended to your declaration.  
18 A. Yes.  
19 Q. And -- okay. We'll get back to that,  
20 but I just wanted to have images of the products  
21 before us while we get back into this next line of  
22 questioning.  
23 A. All right.  
24 Q. If you need them, they're there.

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1 Going back to interrogatory No. 2 of the  
2 response, Exhibit 8, in the middle of the paragraph  
3 there is a sentence that says: "The combination of  
4 the color of the bag, location of the display window,  
5 and location, shape, and color of the oval with  
6 numerals has been used consistently since the update  
7 of its trade dress in 2011, and they create a  
8 distinctive trade dress that has become identified  
9 with Dum-Dums."  
10 Do you see that?  
11 A. Yes.  
12 Q. Is that an accurate description of  
13 the -- what Spangler contends is the trade dress of  
14 its Dum-Dums packaging?  
15 A. Yes. I think there's probably some  
16 other elements that you could maybe include in there,  
17 but those are the main ones, yes.  
18 Q. So looking at Exhibit A to your prior --  
19 your declaration -- if you need me to staple that, let  
20 me know.  
21 A. Okay. I'm good.  
22 Q. In this Exhibit A to your declaration,  
23 which is Exhibit 9 to this deposition, this shows what  
24 I'll call the older trade dress of the Dum-Dums

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1 packaging from roughly 1995 to roughly 2010.  
2 A. (Witness nods head.)  
3 Q. Is that correct?  
4 A. Yes.  
5 Q. And on this packaging, there is what is  
6 referred to as a blue ribbon with a yellow outline  
7 running across the bag with multicolored dots in it.  
8 A. Yes.  
9 Q. And that was on all the packaging that's  
10 shown on this image?  
11 A. Yes.  
12 Q. And then if you turn to Exhibit B,  
13 Dum-Dums or Spangler has continued to use such trade  
14 dress with a blue ribbon running across it with a  
15 yellow outline and differently formatted multicolored  
16 dots, but multicolored dots roughly within that blue  
17 frame.  
18 A. Yes.  
19 Q. And that's consistently used on its  
20 packaging for Dum-Dums?  
21 A. Yes.  
22 Q. But you're not describing that as part  
23 of the trade dress of Dum-Dums in response to  
24 interrogatory No. 2?

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1     **A.**   No. We didn't list it. That is part of  
2     our trade dress, as is, I think, the little drum man.  
3     We've used him pretty consistently, maybe not a  
4     hundred percent, but generally we put him on the -- on  
5     the bags. So that's part of -- to me that's part of  
6     the trade dress as well.  
7     Q.   The drum man, he doesn't have a name,  
8     does he?  
9     **A.**   **The Drum --**  
10    Q.   The Drum Man.  
11    **A.**   **The Drum Man.**  
12    Q.   You should have had a name for him at  
13    some point.  
14    **A.**   **I know. I know. We've been talking**  
15    **about it.**  
16    Q.   Now, in Exhibit B to your declaration,  
17    looking at the packaging, there is also what I'll call  
18    a triangle of blue in the upper left-hand corner with  
19    a number indicating the number of flavors within the  
20    bag.  
21    **A.**   **Yes.**  
22    Q.   And I know it's not a perfect triangle,  
23    just a general shape there. And that blue triangle is  
24    used on all the packaging showed on Exhibit B for

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1   Dum-Dums, correct?  
2   **A.**   **Yes.**  
3   Q.   Okay. And is that also part of the  
4   trade dress of Dum-Dums?  
5   **A.**   **Yes. That's part of it, yes, part of**  
6   **the design. It's all together part of the trade**  
7   **dress, I think.**  
8   Q.   And you didn't identify that as part of  
9   the trade dress in response to interrogatory No. 2?  
10  **A.**   **No.**  
11  Q.   And looking at that sentence, in  
12  response No. 2, when you say "the combination of the  
13  color of the bag," the color you're referring to there  
14  is red, I'm assuming?  
15  **A.**   **Yes.**  
16  Q.   "Location of the display window," is  
17  that roughly in the bottom half of the bag?  
18  **A.**   **Yes.**  
19  Q.   "And location, shape, and color with  
20  numerals," I'm assuming location is generally on the  
21  lower right-hand side?  
22  **A.**   **Yes.**  
23  Q.   Except in the 500 bag, where it's in the  
24  center?

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1   **A.**   **Correct. And the 500 count is in the**  
2   center, because the consumer wouldn't see it otherwise  
3   because of the display case if it was on the -- all  
4   the way over.  
5   Q.   Because of the --  
6   **A.**   **Just the design of the case.**  
7   Q.   The cardboard case in which these are  
8   displayed has sides on it that prevent you from seeing  
9   the sides of the bag?  
10  **A.**   **Correct.**  
11  Q.   And when you're referring to the shape,  
12  what shape are you referring to?  
13  **MR. WICKLUND:** Shape of --  
14  **BY MR. STRAND:**  
15  Q.   "Shape and color of the oval," I'm  
16  assume you're referring to the oval shape?  
17  **A.**   **Yes.**  
18  Q.   And color being generally yellow-ish?  
19  **A.**   **Yeah. The blue on the yellow, yes.**  
20  Q.   The blue type on yellow?  
21  **A.**   **Yeah.**  
22  Q.   I don't see any mention there of the  
23  coloring of the Dum-Dums name. Is the white lettering  
24  of the Dum-Dums name part of the trade dress of -- the

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1   Dum-Dums trade dress?  
2   **A.**   **Yeah. That's our logo, so, you know,**  
3   **we're very consistent with how we use that -- that**  
4   **logo and the shadowing of the logo. But, yeah, it all**  
5   **goes together as part of the trade dress.**  
6   Q.   And the color white of that lettering  
7   would be one aspect of the trade dress?  
8   **A.**   **I'm just trying to think where we've**  
9   **used applications as a Dum-Dums brand where we didn't**  
10  **use the white, and I can't think of any, except maybe**  
11  **on some -- perhaps on the display case we've used a**  
12  **different color when we've had to.**  
13  **But for the most part, when we use the**  
14  **red packaging, we use the white Dum-Dums logo.**  
15  Q.   And we'll get more into this later, but  
16  there are instances in which Dum-Dums are sold without  
17  the red packaging; for instance, on holidays.  
18  **A.**   **Yes. It's -- it's usually when we have**  
19  **a different flavor mix within the bag. But most, if**  
20  **not all the time, it's just single -- our standard**  
21  **mix, traditional mix of the 16 flavors, we put it in**  
22  **the red bag.**  
23  **We use other colors when it's a**  
24  **different type of flavor mix, which could be**

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1 **seasonally.**  
2 Q. The next sentence, I believe, states --  
3 and this is again in the interrogatory response.  
4 **A. Uh-huh.**  
5 Q. "Before Tootsie introduced its new  
6 packaging, Spangler's Dum-Dums bag was the only  
7 lollipop bag that used this color scheme and locations  
8 of graphic elements."  
9 Do you see that?  
10 **A. Yes.**  
11 Q. And when you say Tootsie's new packaging  
12 there, you're referring to the packaging that's shown  
13 in Exhibit F in your declaration, the  
14 Charms Mini Pops?  
15 **A. Yes.**  
16 Q. And then Exhibit C to your  
17 declaration -- I apologize for going back and forth  
18 here -- you have some examples at the top there. You  
19 say Trade Dress Examples.  
20 Do you see that?  
21 **A. Yes.**  
22 Q. And besides the Tootsie Pops Miniatures  
23 that's shown there, are any of the other pops you have  
24 displayed there mini pops?

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1 **A. I don't know about the original gourmet**  
2 **ones, but there may be. I don't know for sure. But,**  
3 **no, these other ones are -- I believe, are not**  
4 **miniature pops.**  
5 Q. And for both the Tootsie Pops and  
6 Tootsie Pops Miniatures, the window in those bags you  
7 show there are in the lower portion of the bag,  
8 correct?  
9 **A. Yes.**  
10 Q. And then in the Tootsie Pops Miniatures,  
11 there is an oval that says "200 Pops" in it in the  
12 lower right-hand corner, correct?  
13 **A. Yes.**  
14 Q. And though I believe the color is  
15 distorted here, at least portions of the writing for  
16 Tootsie Pops Miniatures is in white on the packaging.  
17 **A. Yes.**  
18 Q. And do you know what color the half  
19 circle on which "Tootsie Pops Miniatures" is placed  
20 is?  
21 **A. I'm going just from this picture. It**  
22 **looks like it's a red.**  
23 Q. Okay. And then there's also in the  
24 Caramel Apple Pops a window in the lower portion of

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1 the bag?  
2 **A. Yes.**  
3 Q. And same with Original Gourmet  
4 Lollipops.  
5 **A. Yes.**  
6 Q. And Jolly Rancher, Tootsie Pops,  
7 Blow Pops, Tootsie Pops Miniatures and Original  
8 Gourmet Lollipops all use white lettering as part of  
9 the packaging for those names?  
10 **A. Yes. Their logos all have white.**  
11 Q. Is there a purpose for the window on the  
12 packaging of Dum-Dums?  
13 **A. Is there a purpose?**  
14 Q. Sure.  
15 **A. Yes. It's just so consumers can see**  
16 **the -- so they can see the pops, they can see the**  
17 **variety of flavors. It's also a little bit of the**  
18 **design element of just, again, showing the product,**  
19 **showing the actual product to the consumer.**  
20 Q. And the -- the product which has the  
21 sashay wrap on it, you consider that itself to be  
22 trade dress of Spangler, correct?  
23 **A. The sashay wrap, yes.**  
24 Q. And you can see that through the window

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1 with -- in the Dum-Dums packaging.  
2 **A. Yes.**  
3 Q. And that would be identifiable --  
4 identifiable just as myself who may only see the pops  
5 at the salon or bank?  
6 **A. Yes. I mean, it's a little hard to see**  
7 **in there, but you can -- you can see them.**  
8 Q. I'll just have you go to interrogatory  
9 No. 5, which is on page 4 of Exhibit 8.  
10 **A. Okay.**  
11 Q. Take a moment and read that to yourself  
12 so you're familiar.  
13 **A. Yes.**  
14 Q. And you signed these back on September  
15 30th. Since that day, has Spangler become aware of  
16 any actual complaints of consumer confusion from  
17 retail customers?  
18 **A. I don't know of any complaints from**  
19 **retail customers.**  
20 Q. Do you know of complaints from other  
21 customers?  
22 **A. No. If you're asking -- we don't**  
23 **have -- no.**  
24 Q. So as of now, Spangler doesn't have any



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1 just let you first take your time on your own just to  
2 review that response so you're familiar with it.

3 **A. Okay. I kind of glanced at it quick.**

4 **Q. Sure. This is from September 30th, and**  
5 **I'm just wondering if there is any other facts**  
6 **supporting Spangler's allegation it's been damaged by**  
7 **Tootsie's use of the accused packaging for its Charms**  
8 **Mini Pops besides what's listed here.**

9 **A. Well, we're in the Halloween period now,**  
10 **so we are having our -- we're looking for the**  
11 **distribution of the Charms Mini. And I don't know if**  
12 **we captured all of them in here, but I know there's**  
13 **been, I think, Hy-Vee -- I guess that's already listed**  
14 **in here.**

15 **We're asking our sales team, If you see**  
16 **this Charms Mini item, let us know; and so we're**  
17 **getting those in. I don't know if they're more than**  
18 **we've already listed here or not.**

19 **Q. I'm assuming Halloween period is a**  
20 **relatively large buying period for Dum-Dums.**

21 **A. Yes.**

22 **Q. And you have separate packaging for**  
23 **Halloween for Dum-Dums as well?**

24 **A. It depends. Generally, no. For the**

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1 **most part, most of what we sell is the red bag.**  
2 **Sometimes we do a specific flavor mix, especially when**  
3 **retail customers say they want a Halloween look, and**  
4 **so then we'll -- we'll change the bag color.**

5 **But I'm guessing -- I'm guessing over 90**  
6 **percent of it is in the red bag.**

7 **Q. This year is there a -- does Spangler**  
8 **offer a Halloween-look bag for its Dum-Dums?**

9 **A. Yes.**

10 **Q. And at what outlets, to your knowledge,**  
11 **is that being sold?**

12 **A. I -- I don't know for sure. I would**  
13 **have to go look it up.**

14 **Q. And would it be your estimation,**  
15 **consistent with what you just said, I just want to**  
16 **confirm, that about 10 percent, you're estimating, of**  
17 **your sales will be of that type of bag versus the red**  
18 **bag this year?**

19 **A. That would be on the high side. I'm**  
20 **pretty sure it will be less than 10 percent.**

21 **Q. You specifically called it Hy-Vee. Why**  
22 **did you call it Hy-Vee?**

23 **A. Just a second ago.**

24 **Q. Yes.**

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1 **A. I just happened to remember it. Someone**  
2 **from our sales team said, Hey, I saw it in Hy-Vee.**

3 **Q. Gotcha.**

4 **A. I see it was already listed here.**

5 **Q. For -- in response to interrogatory**  
6 **No. 12, part 1, subpart a. there, talking about retail**  
7 **Party City.**

8 **A. Uh-huh.**

9 **Q. Do you know, first of all, is Party City**  
10 **using the red bag -- or was it using a red bag, or was**  
11 **it using a Halloween bag?**

12 **A. They were using the red bag, I've**  
13 **very -- I'm pretty sure of that.**

14 **Q. And did they tell Spangler why they**  
15 **replaced the 300-count Dum-Dums with Charms Mini Pops**  
16 **on the account?**

17 **A. I -- I don't know. I was -- I wasn't on**  
18 **that call.**

19 **Q. Do you know if Charms Mini Pops were**  
20 **sold to retail Party City for less than Spangler was**  
21 **offering its Dum-Dums?**

22 **A. I don't know.**

23 **Q. Do you know if the coloring of the**  
24 **Charms Mini Pops bag had any influence on the buyer at**

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1 **Party City?**

2 **A. I don't know. I haven't talked to the**  
3 **buyer.**

4 **Q. And part b., talking about Sam's Club**  
5 **buyer.**

6 **A. Yes.**

7 **Q. Actually, before we get to that. When**  
8 **typically do retailers place orders for Halloween --**  
9 **well, strike that. Let me ask a foundation question**  
10 **for that.**

11 **Do most retailers make a separate larger**  
12 **purchase for the Halloween time period?**

13 **A. Yes.**

14 **Q. Okay. And when generally do they place**  
15 **that type of order?**

16 **A. I want to say the May -- the May/June**  
17 **time period, roughly. It depends on the retailer.**  
18 **Some people are further out, but probably on average**  
19 **it's in that range.**

20 **Q. Going back to 1b., did the Sam's Club**  
21 **buyer convey to Spangler why it would perform the test**  
22 **of Charms Mini Pops?**

23 **A. Yes.**

24 **Q. Why?**

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1 A. He said that -- that they did have a  
2 better value than us, that they -- he said that they  
3 were selling the 600 count for the same -- either the  
4 same or similar price as our 500 count; and he thought  
5 that the bags looked the same; and he thought that  
6 people wouldn't notice the difference in the brands;  
7 and he thought -- he said he thought people might be  
8 confused, but they might not care, and they'd have to  
9 see how many complaints that they got.

10 Q. What is the gentleman's name, the  
11 Sam's Club buyer? Or woman, sorry.

12 A. It will come to me. David. Bingham.

13 Q. Bingham?

14 A. David Bingham.

15 Q. So he did convey to Spangler that he  
16 thought one of the reasons they were going to do the  
17 test was because the bags were similar looking?

18 A. Yes.

19 Q. But also the fact that they were a  
20 better value because of the pricing at the 600 versus  
21 500?

22 A. Yes.

23 Q. I'm assuming value is something that  
24 most retail buyers take into consideration?

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1 A. Yes.

2 Q. And value is something that the end  
3 consumers also take into consideration?

4 A. Yes.

5 Q. And it's not unusual for your  
6 competitors to sometimes be cheaper or undercut the  
7 Dum-Dums pricing.

8 A. Yes. Most of -- you know, Charms Mini  
9 has been below our pricing for a long, long time, as  
10 well as some of the imported mini pops that I  
11 mentioned before. They're almost always below our  
12 price.

13 But when we talk about value, value is  
14 also the brand perception, so it's not just about  
15 price. When I say value, it's about the whole of what  
16 the consumer is getting. Prices -- I think about  
17 price differently than value.

18 Q. Can you explain to me, not being a  
19 company person, referring to here with the Sam's Club  
20 Halloween Promotional Accrual of 350,000 dollars, what  
21 does that refer to?

22 A. So we have to, in order to get  
23 merchandising in the front of the store at Halloween,  
24 which is a key spot, merchandising spot, you have to

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1 pay Sam's money, and so it's 350,000 dollars a year.  
2 Sam's -- does that answer your question?

3 Q. And does that mean the -- when you say  
4 "the front of the store," I'm thinking that -- I don't  
5 know if I've been to Sam's in a while; but Costco, you  
6 immediately enter, and there's a spot where there's  
7 stuff that could be further back in the store, but  
8 it's promotional, it seems like.

9 A. Correct.

10 Q. Okay. And so Spangler was paying Sam's  
11 350,000 dollars a year in order to get Dum-Dums  
12 packaging up towards -- in that area?

13 A. Correct.

14 Q. Okay. And then what is it referring to  
15 here as the reduction, the 10 percent reduction  
16 request?

17 A. So Sam's closed about 10 percent of  
18 their stores last year, since Halloween of 2017, so we  
19 wanted to, of course, go in and say, hey, the  
20 promotion should -- we should pay 10 percent less,  
21 because there's 10 percent less stores. That's where  
22 the 10 percent comes from.

23 Q. Gotcha. Are Dum-Dums sold at Costco?

24 A. Not currently, no.

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1 Q. Are they sold at BJ's?

2 A. Yes.

3 Q. Do you know if Charms Mini Pops are sold  
4 at Costco?

5 A. Yes.

6 Q. They are sold at Costco?

7 A. I believe they are, yes. At their  
8 Costco business centers.

9 Q. And the -- do you know if they're sold  
10 at BJ's?

11 A. Charms Minis?

12 Q. Correct.

13 A. I'm pretty sure they're not. I would  
14 have heard about that. As I say, I don't know for  
15 sure, but I don't think so.

16 Q. Prior to Charms launching its new  
17 packaging, had Spangler lost retail accounts to  
18 Tootsie in the past?

19 A. To Charms --

20 Q. To Charms.

21 A. -- Mini?

22 Q. Yeah, to Charms Minis.

23 A. The only -- the only place that I think  
24 that that happened was at the Costco business centers.

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1 doing that, if I could ask you to --  
2 perfect. Thank you.  
3 Do you know where the front of  
4 your declaration went?  
5 **THE WITNESS:** That's it.  
6 **BY MR. STRAND:**  
7 Q. If you turn to paragraph 7 of your  
8 declaration, which is Exhibit 9 of this deposition.  
9 Do you have any -- in the middle here of  
10 the paragraph, you state, quote, Consumers often do  
11 not scrutinize packaging closely for details  
12 concerning the product before selecting for purchase.  
13 Do you see that?  
14 A. Yes.  
15 Q. Do you have data on how long consumers  
16 look at packaging of Dum-Dums before purchasing?  
17 A. **I don't have data. Just from my**  
18 **experience we know it's not very -- it's not very**  
19 **long.**  
20 **I learned back in business school that**  
21 **it's -- and Sam's Clubs had something called the**  
22 **5-by-5. So people have -- they're looking at**  
23 **something from 5 feet away, and you've got to**  
24 **communicate what you need to in 5 seconds, because**

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1 **that's all you have.**  
2 **So that's -- but is there data on that?**  
3 **I haven't seen that, but I think that's a widely kind**  
4 **of accepted kind of fact about consumer behavior.**  
5 Q. And later on in that paragraph, you  
6 state: "That is why the font of the packaging text  
7 tends to be very small and arranged in a manner that  
8 does not really require the consumer read the  
9 packaging," and goes on from there.  
10 A. **Yeah.**  
11 Q. When you're talking about the text being  
12 very small, you're not referring to Dum-Dums text, I'm  
13 assuming.  
14 A. **The brand, the logo?**  
15 Q. Correct.  
16 A. **No.**  
17 Q. And you consider that to be large?  
18 A. **Yes.**  
19 Q. Okay. And would you say the same for  
20 the Charms Mini Pops brand?  
21 A. **Yes, yes.**  
22 Q. On paragraph 8 towards -- on page 4, it  
23 states: "Spangler reviewed over 35 designs and  
24 consumer tested the top four to determine which one

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1 was most distinctive and acceptable to consumers."  
2 Do you see that?  
3 A. **Yes.**  
4 Q. And what did -- what does "most  
5 distinctive" to you mean there? What do you mean by  
6 that?  
7 A. **I think it was -- it was the one that**  
8 **kind of communicated all the elements of the brand the**  
9 **best.**  
10 Q. And paragraph 11 states, "Spangler's  
11 trade dress for its Dum-Dums lollipops is distinctive,  
12 particularly in the market for lollipops, and it  
13 indicates to the consuming public the source or origin  
14 of the product."  
15 Do you think Spangler's trade dress for  
16 Dum-Dums, in particular its red bag, is distinctive in  
17 the candy field in general?  
18 A. **yeah.**  
19 Q. What aspects of it do you believe make  
20 it distinctive for candy? In the candy field, excuse  
21 me.  
22 A. **Well, I guess I say that because I think**  
23 **about a consumer looking at the shelf, and you would**  
24 **see our bag from a distance and know that's Dum-Dums**

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1 **lollipops, as opposed to any other of the candies,**  
2 **including chocolate.**  
3 Q. Including chocolate?  
4 A. **Yeah, I can't -- of course, we compete**  
5 **more in the non-chocolate space. But I can't think of**  
6 **a chocolate candy that looks like ours either.**  
7 Q. And you compete in the hard candy space  
8 as well?  
9 A. **Yes.**  
10 Q. Later on in this paragraph you state  
11 it's only lollipop bag whose primary color was red.  
12 Do you have a definition for what you  
13 mean by "primary"?  
14 A. **To me, that definition is**  
15 **self-explanatory. It means there's more of that color**  
16 **than any other colors.**  
17 Q. Okay. In paragraph 16, skipping ahead a  
18 little bit, first, when in 2018 was Spangler alerted  
19 by a buyer about the statement made there in 16?  
20 A. **And the question is?**  
21 Q. Sure, when in 2018.  
22 A. **It was the beginning part of the year.**  
23 **In fact -- I can't remember the exact time. I**  
24 **remember it was from a Walgreens buyer. But that's**

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1 Q. Was that in-person, or was that over the  
2 phone or --  
3 A. **That was in-person.**  
4 Q. Okay. The terms "sales call" always  
5 throws me off.  
6 A. **Okay.**  
7 Q. Where is the buyer for Sam's Club  
8 located?  
9 A. **Bentonville, Arkansas.**  
10 Q. Who attended that meeting on Spangler's  
11 behalf?  
12 A. **It was myself, Evan Brock,**  
13 **Glenn Hudspeath, I think Jeff Devlin was there. There**  
14 **was four.**  
15 Q. And when did that meeting occur?  
16 A. **It was the beginning of May.**  
17 Q. When was the first time that -- I'll ask  
18 you personally first.  
19 A. **Uh-huh.**  
20 Q. When is the first time you saw the new  
21 packaging for the Charms Mini Pops bag?  
22 A. **It was sometime in mid winter, I think.**  
23 **So does that answer your question?**  
24 **I don't remember the precise time. I do**

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1 **remember when I did see it, I just remember thinking**  
2 **that Brian Rinker was -- was right.**  
3 Q. Brian Rinker being --  
4 A. **Being the Walgreens buyer. Because he**  
5 **had just -- that was what he had said, and I do**  
6 **remember thinking that. I just don't remember the**  
7 **exact -- exact date.**  
8 Q. Do you remember the circumstances under  
9 which you saw the new packaging?  
10 A. **I think I saw it by e-mail.**  
11 Q. When was the first time that -- strike  
12 that.  
13 In this -- did Brian Rinker ever show  
14 anyone at Spangler the updated Charms Mini Pops bags?  
15 A. **I don't think so, no. I wouldn't expect**  
16 **him to.**  
17 Q. Who is the -- when was the first time  
18 that Spangler saw the revised Charms Mini Pops bag?  
19 A. **Again, I think it was sometime in the**  
20 **winter. I can't remember the exact circumstance. One**  
21 **of our sales folks -- I don't know if they saw it at**  
22 **one of the ECRMs but -- and that's how we got a**  
23 **picture of it. Or I can't remember exactly how we got**  
24 **the photo but ...**

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1 Q. Would it have been after the Walgreens  
2 meeting?  
3 A. **Oh -- oh, yes, definitely.**  
4 Q. So the -- the alert that's described in  
5 paragraph 16 of your declaration from Walgreens, that  
6 was the first instance that Spangler heard about the  
7 revised bags, the revised Charms bags?  
8 A. **Yeah, that's correct, yeah.**  
9 Q. And at 19 of your declaration -- sorry,  
10 if you don't mind me helping you out a little bit  
11 here, I'm just going to slide these under here. I  
12 should have stapled these all.  
13 A. **I'm sorry. 19?**  
14 Q. Correct.  
15 A. **Okay.**  
16 Q. You state in the second sentence: "For  
17 many years, Tootsie and Spangler sold Charms Mini Pops  
18 and Dum-Dums, respectively, using similar yellow  
19 pallet boxes with a U-shaped cut-out to display the  
20 bags of product inside the ballot box."  
21 I assume that should be "pallet box."  
22 A. **Yes. I'm not sure exactly what that --**  
23 **"inside the case," that's probably what it should have**  
24 **been.**

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1 Q. And you recognize that Tootsie has sold  
2 Charms Mini Pops and displayed them in yellow pallet  
3 boxes for many years?  
4 A. **Yes.**  
5 Q. Do you know if it was doing that before  
6 Spangler was using yellow boxes for its Dum-Dums?  
7 A. **I don't know. I guess when I -- well, I**  
8 **think we've been -- I guess by definition, we would**  
9 **have to have done it first, because I don't think the**  
10 **Charms Minis came out until after 2000, and I know**  
11 **that we were already using the yellow box since then.**  
12 Q. Do you know if Tootsie was using yellow  
13 pallet boxes with the U-shaped cutout for any of its  
14 other products prior to Spangler using the yellow  
15 pallet box?  
16 A. **I don't know.**  
17 Q. When was the last time you reviewed the  
18 entirety of this declaration?  
19 A. **I read it the other day.**  
20 Q. When you read it the other day, did you  
21 come across anything that you thought needed to be  
22 corrected?  
23 A. **No.**  
24 Q. In paragraph 20, on the last page, there

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1 is a reference to a representative of a large retail  
2 customer.  
3 **A. Yes. Okay. Like the fourth sentence?**  
4 Q. Fourth line, at least.  
5 **A. Fourth line, yes. Okay.**  
6 Q. Who is that, which large retail  
7 customer?  
8 **A. That's Sam's Club.**  
9 Q. Did the buyer -- I think -- I forget  
10 whether you said this or not. But did the buyer  
11 actually say that he hoped consumers would be  
12 confused?  
13 **A. He didn't say he "hoped." He thought**  
14 **they might be confused, and that they -- he expected**  
15 **to get some complaints, but that they would measure**  
16 **the amount of complaints, and that he -- well, that's**  
17 **what he said.**  
18 Q. Okay. Did he say this to you in  
19 writing, or was this orally?  
20 **A. It was orally.**  
21 Q. Did anyone take contemporaneous notes  
22 from this meeting?  
23 **A. Did I?**  
24 Q. Did anyone at Spangler.

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1 **A. Yeah. I probably took some -- yes. We**  
2 **probably all took notes.**  
3 **MR. STRAND:** You can put that back  
4 together and set it aside for now. I'll  
5 clean up a little bit.  
6 (Court Reporter marked  
7 Defendant's Exhibit 10.)  
8 **BY MR. STRAND:**  
9 Q. I'm handing you what's been marked  
10 Exhibit 10, which was produced in this litigation as  
11 Spangler 00018 through 20. And just, if I haven't  
12 said this already, Mr. Vashaw, there's numbers at the  
13 bottom that I'll represent to you is production,  
14 sometimes as Bates number, that are on every single  
15 piece of paper in this litigation, and just for ease  
16 of reference.  
17 **A. Okay.**  
18 Q. First, what is Exhibit 10?  
19 **A. This appears to be all of our trademarks**  
20 **that we have.**  
21 Q. Do you know if it's all of Spangler's  
22 trademarks, or is it just the trademarks related to  
23 certain lines or --  
24 **A. This looks like all of our trademarks.**

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1 Q. And this is all the registrations, not  
2 necessarily -- this is all the registrations?  
3 **A. Correct.**  
4 Q. You believe -- Spangler, I'm assuming,  
5 believes it has other trademarks that may not be  
6 registered?  
7 **A. Yes. These are the registered**  
8 **trademarks.**  
9 Q. And the -- do you understand trade dress  
10 can be registered with the United States Patent and  
11 Trademark Office?  
12 **A. Yes, I do understand that.**  
13 Q. Okay.  
14 (Court Reporter marked  
15 Defendant's Exhibits 11 and 12.)  
16 **MR. STRAND:** I'm handing you  
17 what's been marked as Exhibits 11 and  
18 12.  
19 For the record, 11 is a printout  
20 of registration No. 3397436, and Exhibit  
21 12 is a U.S. registration trademark No.  
22 1535574.  
23 **BY MR. STRAND:**  
24 Q. And the Exhibit 11 is the registration

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1 for the -- what we have referred to as the sashay wrap  
2 of the Dum-Dums pop earlier.  
3 **A. Yes.**  
4 Q. And then the other one is a registration  
5 for the handle of the Saf-T-Pop that Spangler  
6 manufactures?  
7 **A. Yes.**  
8 Q. Does Spangler have any registration on  
9 the alleged trade dress for its Dum-Dums packaging?  
10 **A. I don't believe so.**  
11 Q. Do you know why not?  
12 **A. Well, I'm not a lawyer, but I know the**  
13 **problem is when you do that, you make a slight change,**  
14 **you have to keep refiling it. So, you know, there's**  
15 **just a practical nature. You know, we're changing the**  
16 **weight and the ingredient statement and things like**  
17 **that all the time.**  
18 **And, you know, you'd have to keep**  
19 **refiling, and we have so many different SKUs -- I**  
20 **don't know how many total SKUs we have, you'd have to**  
21 **file -- but my understanding is you'd have to file one**  
22 **for every bag design and every configuration, and**  
23 **there would be dozens of those that you would**  
24 **constantly have to be updating. So I believe that's**



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Page 111

[REDACTED]

1 (A luncheon recess was taken from  
2 12:08 p.m. to 12:50 p.m.)  
3 **THE VIDEOGRAPHER:** We are back  
4 on the record. The time is 12:50 p.m.  
5 (Court Reporter marked  
6 Defendant's Exhibit 15.)  
7 **BY MR. STRAND:**  
8 Q. Good afternoon.  
9 A. **Good afternoon.**  
10 Q. I'll show you what's been marked as  
11 Exhibit 15, which is marked Spangler 48 through 54.  
12 And this appears to be an Amazon listing from  
13 approximately August 28th, 2018, when the search  
14 "Dum-Dums" is applied; is that right?  
15 A. **That's the way it looks, yes.**  
16 Q. Okay. And do you know who the Diana is  
17 that's mentioned at the top here above "Account"?  
18 A. **That would be Diana Moore Eschhofen, I'm**  
19 **guessing.**  
20 Q. And the first image here of the Dum-Dums  
21 spilling out of a brown box, that is a bulk box that  
22 is sold by Spangler?  
23 A. **No. That's -- I think this is A Great**  
24 **Surprise -- this is someone that we've had an issue**

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[REDACTED]

18 **MR. STRAND:** Let's take a break  
19 for lunch.  
20 **MR. WICKLUND:** MR. STRAND: Okay.  
21 We're going to be in a different  
22 conference room. You're all invited.  
23 **THE VIDEOGRAPHER:** We are going  
24 off the record. The time is 12:08 p.m.

1 **with, has been reselling our product online.**  
2 **So the first two items are not sold by**  
3 **Spangler. Although it's -- it says by "Dum Dums," but**  
4 **it's not Spangler who makes that.**  
5 Q. Okay.  
6 A. **Those first two items.**  
7 Q. Do you know the name of that individual  
8 or company?  
9 A. **Well, it's called A Great Surprise. I**  
10 **see the -- I think that's what the top one is, too.**  
11 **Because we don't -- we don't have a 2.4 pound box.**  
12 Q. And then where are you getting the  
13 name -- strike that.  
14 I think you said the word "Great  
15 Surprise" appears on one of these labels here; is that  
16 correct?  
17 A. **Yeah. I think it appears on both of**  
18 **them.**  
19 Q. And do you recognize that label on the  
20 bag as the, the second one here, as the Great Surprise  
21 label?  
22 A. **Yes.**  
23 Q. Do you know if Great Surprise is located  
24 in the United States or abroad?

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1 **A. I think they're in the United States,**  
2 **because I think we've had some discussions with them**  
3 **of not selling this item online.**

4 Q. Have you had -- have you sent any  
5 cease-and-desist letters?

6 **A. I think -- I don't know the exact**  
7 **correspondence that we've had with them. I just**  
8 **don't. I don't know.**

9 Q. Have you sued them?

10 **A. I know we haven't sued them.**

11 Q. The bottom one here, though, that is the  
12 red Dum-Dums bag that we have been talking about in  
13 this case.

14 **A. Yes, yes.**

15 Q. And then if you turn to the second page,  
16 the second item there, it says, "Light Blue Dum Dums  
17 Color Party," what is that bag?

18 **A. So this is a line of single-color pops**  
19 **that we have introduced. And so "Color Party," there**  
20 **are -- they're individual colors in each bag. So that**  
21 **happens to be the light blue bag.**

22 Q. And what other colors are offered by  
23 Dum-Dums today?

24 **A. I believe it's like 13 different colors,**

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1 **somewhere in that range, roughly a dozen.**

2 Q. Are the bags between the different  
3 colors any different besides the pops inside them?

4 **A. No. It's all the same graphics, and**  
5 **then we use the window to differentiate the color.**

6 Q. Are the Color Party bags offered in any  
7 other sizes between -- besides what I believe says  
8 75 --

9 **A. 75.**

10 Q. -- 75 count?

11 **A. No, not in -- no. There are some -- not**  
12 **that we sell. There is an item that goes in a**  
13 **particular set for Party City that has kind of**  
14 **Party City typographics to match their set, but that's**  
15 **sold to Party City. Everyone else is just sold the 75**  
16 **count. I don't think we have any different SKUs for**  
17 **that.**

18 Q. And then below there -- strike that.

19 That packaging that we see for the Color  
20 Party bag, that is packaging that Dum-Dums currently  
21 uses today.

22 **A. Yes.**

23 Q. And then below that, there's two  
24 Dum-Dums bags that says Value Pack of two.

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1 Are each of those bags 20 count?

2 **A. Yes.**

3 Q. And is that trade dress or the format of  
4 the bags that Dum-Dums uses today for those 20-count  
5 bags? Strike that. Let me ask that clearer.

6 Does Dum-Dums still manufacture and  
7 offer for sale 20-count-bag Dum-Dums?

8 **A. I believe so, yes.**

9 Q. Okay. And would that be the format of  
10 the bag for the 20-pops bags today?

11 **A. I believe so.**

12 Q. And below that, there are additional  
13 bags that say "Dum-Dums" on them. Are those official  
14 Dum-Dums bags?

15 **A. Yes.**

16 Q. And does Dum-Dums still package pops in  
17 bags that look like those?

18 **A. Those are only -- yes. Those are only**  
19 **sold on the Internet. The ones that say "Favorite**  
20 **Flavor," those are only sold on the Internet.**

21 Q. And I'm assuming they have one flavor in  
22 them?

23 **A. Correct.**

24 Q. Do you sell any other flavors besides --

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1 **A. Cherry.**

2 Q. -- cherry?

3 **A. Yes. I don't know the exact number.**  
4 **I'm guessing like eight.**

5 Q. So not all the flavors, just a subset of  
6 them?

7 **A. Yes, I believe so.**

8 Q. And then is that a -- does Dum-Dums sell  
9 a 30-pound box?

10 **A. Yes.**

11 Q. And is that roughly what it looks like  
12 below there?

13 **A. Yes.**

14 Q. Obviously it's poured open and we can't  
15 see the sides.

16 **A. Yes.**

17 Q. And does it have any red coloring on the  
18 outside of the box, or is it just black?

19 **A. This particular one doesn't, no.**

20 Q. Are there any of the bulk boxes that do  
21 have red on them?

22 **A. I guess the answer to that is no. We're**  
23 **in the process of developing one, but not that's**  
24 **currently for sale.**



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1 Q. Okay. And then on top of the next page,  
2 I'm assuming that's the Great Surprise?  
3 **A. That's a Great Surprise, yeah.**  
4 Q. Does Great Surprise, to your knowledge,  
5 sell any other candy besides Dum-Dums?  
6 **A. I don't know that. I'm guessing they**  
7 **do, yes.**  
8 Q. How long has Spangler known that Great  
9 Surprise is reselling Dum-Dums?  
10 **A. I might be off on my date. I know we**  
11 **talked about this last year, 2017 at least.**  
12 Q. And then below that is a Dum-Dums --  
13 that's a 500-pack bag, correct?  
14 **A. Yes.**  
15 Q. And would that be somebody else  
16 reselling it from Sam's Club, or does Dum-Dums sell  
17 500-pound bags [sic] online as well?  
18 **A. I don't think we sell that online, and**  
19 **it says by Dum-Dum's, apostrophe S. It's tricky how**  
20 **the online folks do it. I think those are people**  
21 **buying it from Sam's Club and reselling it. I don't**  
22 **think we sell that online ourselves.**  
23 Q. Okay. At the very bottom of page 50,  
24 there is a bag that says Dum-Dums Summertime

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1 Favorites.  
2 **A. Yes.**  
3 Q. Is that an official Dum-Dums bag?  
4 **A. Yes, it is.**  
5 Q. And does Dum-Dums sell that year round  
6 or only during the summertime?  
7 **A. Just the summertime.**  
8 Q. And does -- it has less flavors than the  
9 traditional Dum-Dums bag?  
10 **A. It has less flavors, and they're all**  
11 **unique flavors to this particular bag.**  
12 Q. Okay. So the flavors that are in that  
13 are not offered within the traditional?  
14 **A. Correct.**  
15 Q. And is there a window on that Summertime  
16 Favorites bag?  
17 **A. There is not.**  
18 Q. Is there a call-out as to the number of  
19 pops or the weight of the bag?  
20 **A. The weight of the bag would be on there.**  
21 **But this is -- this tends to be a smaller, so we don't**  
22 **put the count on the smaller -- the smaller bags.**  
23 **This has a metallic type of look to it,**  
24 **which is why it doesn't have a window. It's a -- you**

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1 **can't put a window in a metallic bag.**  
2 Q. And the weight that would be on here  
3 would just be -- strike that.  
4 Is there -- do you know what a violator  
5 is?  
6 **A. Yeah.**  
7 Q. Is there a violator on here that  
8 indicates the weight?  
9 **A. No.**  
10 Q. The weight would just be in the normal  
11 small block --  
12 **A. Yes, exactly.**  
13 Q. -- at the bottom.  
14 And just -- I'll remind us, just let me  
15 finish my question before you answer.  
16 Thank you.  
17 And then up at the next page, looking at  
18 the second one at the bottom, Dum-Dums Summertime, is  
19 that an official Dum-Dums packaging?  
20 **A. Yes.**  
21 Q. And that's for a 250 count of Summertime  
22 Favorites?  
23 **A. Correct.**  
24 Q. And there's no window on that bag, as

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1 well?  
2 **A. Correct, for the same reason.**  
3 Q. And then turning to the next page at the  
4 top, can you describe what the top bag and box are?  
5 **A. Are we on page 50?**  
6 Q. Page 52.  
7 **A. This is -- oh, this is our Color Party.**  
8 **And here -- I think this is sold through our**  
9 **fulfillment center, I think, because they sell this by**  
10 **the case. So they're showing what's inside, and then**  
11 **also the case that you're actually buying.**  
12 Q. And so there would be four 75-count  
13 bags --  
14 **A. Exact --**  
15 Q. -- in that case?  
16 **A. Exactly.**  
17 Q. Sorry, just to remind you, let me finish  
18 my question.  
19 And then immediately below there,  
20 there's a -- I'm going to call it a bucket. Is that  
21 an official Dum-Dums package?  
22 **A. Yes. That's our older style, but yes.**  
23 Q. Do you still manufacture that style?  
24 **A. We manufacture the bucket, but not with**

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1 **that -- that's old graphics.**  
2 Q. So the graphics have changed on the  
3 bucket now?  
4 A. **Correct.**  
5 **(Court Reporter marked**  
6 **Defendant's Exhibit 16.)**  
7 **BY MR. STRAND:**  
8 Q. You've been shown what's been marked as  
9 Exhibit 16 in this deposition. It starts at Spangler  
10 08 -- 00080 through 136.  
11 And what is this document?  
12 A. **Let me just look at it real quick.**  
13 **Are you looking at the whole packet?**  
14 Q. Correct?  
15 A. **So this -- this was put together by**  
16 **Fisher Design back in 2010, and this is when we did**  
17 **our packaging refresh, I'll call it. So this, I**  
18 **believe, is all the kind of behind work that we did**  
19 **with Fisher.**  
20 Q. Do you know if Spangler still has  
21 possession of this -- strike that.  
22 It looks to me that this presentation  
23 would have originally been in color.  
24 A. **Yes.**

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1 Q. Do you know if Spangler still has this  
2 in color?  
3 A. **I'm pretty sure we do.**  
4 Q. And had Spangler worked with  
5 Fisher Design before this project?  
6 A. **I don't know. I think this is our**  
7 **first -- definitely not on a large scale. I know this**  
8 **was our first large project with them.**  
9 Q. Does Spangler still work with Fisher  
10 Design today?  
11 A. **Yes.**  
12 Q. Does Fisher work with -- excuse me.  
13 Does Spangler work with any other  
14 branding or marketing companies today?  
15 A. **Yes. I mean, I think you would have to**  
16 **be more specific. In terms of package design? These**  
17 **are our main package designers, but we use some other**  
18 **freelance people -- people to do some work for us as**  
19 **well.**  
20 Q. And Fisher Design is headed by  
21 Bill Fisher?  
22 A. **Yes. I think he's one of the owners.**  
23 Q. Have you spoken to him before?  
24 A. **Yes.**

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1 Q. Did you speak with him in connection for  
2 this case?  
3 A. **No.**  
4 Q. Did he provide you with the name of any  
5 individuals to serve as experts in this case?  
6 A. **Yes.**  
7 Q. Whose name did he provide you?  
8 A. **David --**  
9 **MR. WICKLUND: Steve Uline.**  
10 **THE WITNESS: Steve Uline. Thank**  
11 **you.**  
12 **BY MR. STRAND:**  
13 Q. Did you speak with Steve Uline?  
14 A. **Yes.**  
15 Q. When was that?  
16 A. **I don't recall. It was in -- it was in**  
17 **regards to this.**  
18 **And I guess I do need to clarify. We**  
19 **got his name through Fisher. I don't remember having**  
20 **a discussion with Bill over the phone. It might have**  
21 **been by e-mail.**  
22 **I can't remember exactly how we got**  
23 **Steve's name, except that it was through Fisher, and**  
24 **it was in connection with this, trying to find**

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1 **somebody that, you know, was an expert in packaging.**  
2 Q. Did Mr. Fisher provide you any other  
3 name besides Mr. Uline?  
4 A. **Not that I remember.**  
5 Q. Did you speak with anyone else besides  
6 Mr. Uline to try to find a -- and when I say "you," I  
7 mean you personally -- with regards to trying to find  
8 a packaging-design expert?  
9 A. **I don't -- I don't recall.**  
10 Q. What do you recall from your discussion  
11 with Mr. Uline?  
12 A. **Just I wanted to know just what**  
13 **experience he had in packaging. He clearly had a lot**  
14 **of experience. He had told me that he had been**  
15 **involved in litigation in the past. That's kind of**  
16 **what I remember.**  
17 Q. What did he tell you about his  
18 experience -- strike that.  
19 After your conversation, did you feel  
20 confident he could serve as an expert in this case?  
21 A. **Oh, yeah. He seemed to know what he was**  
22 **talking about.**  
23 Q. What did he convey to you about his  
24 experience that made you confident in his abilities?

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[REDACTED]

20 **MR. STRAND:** Don't worry. We're  
21 not going through the whole thing.  
22 (Court Reporter marked  
23 Defendant's Exhibit 29.)  
24 **BY MR. STRAND:**

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1 Q. I'll show you what's been marked as  
2 Exhibit 29, which is Spangler 1077 through 1336. At  
3 the top it says Bill Back Detail; Date Range:  
4 1-1-2017 through 9-17-2008.  
5 I believe this was the Excel sheet  
6 attached to 1076, the e-mail for Exhibit 28.  
7 **A. Okay.**  
8 [REDACTED]

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[REDACTED]

11 (Court Reporter marked  
12 Defendant's Exhibit 30.)  
13 **BY MR. STRAND:**  
14 Q. Showing you what's marked as Exhibit 30,  
15 Spangler 1352. And at the top it says Dum-Dums Round  
16 Unfilled in Non-Standard Trade Dress 2012-2018.  
17 Am I correct in assuming that all the  
18 images on here represent the Dum-Dums that were sold  
19 that were unfilled and round in the non-standard red  
20 bags?  
21 **A. Yes.**  
22 Q. Are there any others to your knowledge?  
23 **A. These are the big ones. Like Color**  
24 **Party, they're -- we have a whole -- there's multiple**

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1 iterations of that.  
2 **This seems -- this seems to be**  
3 **comprehensive.**  
4 Q. There's ones toward the bottom right  
5 that says "50 Pops" on top, and then what are those?  
6 **A. This is a special Valentine item that we**  
7 **have. It's these are -- these are boxes, they're not**  
8 **bags. We call it a Valentine bouquet.**  
9 **The reason that the "50" is on top is**  
10 **because this particular configuration, when it sits in**  
11 **the display case, you use the bottom of it. So it's a**  
12 **little different for practical reasons.**  
13 (Court Reporter marked  
14 Defendant's Exhibit 31.)  
15 **BY MR. STRAND:**  
16 Q. I'm going to show you Exhibit 31, which  
17 is Spangler 001378 through 1381.  
18 **A. Okay.**  
19 Q. And it says here in handwriting,  
20 "Spangler Management Meeting Minutes, April 9,  
21 2018" --  
22 **A. Yes.**  
23 Q. -- on the front page.  
24 Are these all management meeting minutes

1 Spangler. And then we have three outside directors,  
2 Liam Killeen, Zac Isaac, and Julia Sabin.

3 Q. Can you --

4 A. Liam Killeen, Zac Issac, and Julia  
5 Sabin.

6 Q. Can you describe who those last three  
7 individuals were or are, excuse me.

8 A. They are -- we call them outside  
9 directors. Liam Killeen works in the ice cream  
10 business, has experience in the candy business.  
11 Zac Isaac is an attorney here in Toledo; and Julia  
12 Sabin is -- I think she's a vice president at  
13 Smucker's.

14 Q. And on page 1380 here, there is another  
15 mention under 2, the first bullet point, of Dum-Dums  
16 Limited Edition item.

17 Is that the same limited edition item we  
18 discussed earlier?

19 A. Yeah. I think we were talking about the  
20 300 count before, so --

21 Q. I think --

22 A. We were expanding our -- we are  
23 expanding our limited-edition line into additional  
24 SKuse, which I think is what this is referring to.

1 Spangler waited until mid May to sue Charms?

2 A. Well, we just kind of found out about it  
3 in -- again, I think in March was the first time we  
4 saw a photo of it, and so I presented it to management  
5 so --

6 Q. And is there a reason after the suit  
7 that Spangler waited until August to bring the  
8 preliminary injunction motion?

9 A. I think we were trying to do it as fast  
10 as we could. I can't remember when the  
11 cease-and-desist letter went out. It certainly -- I  
12 want to say it was April. I mean, it was relatively  
13 quickly, I think.

14 Q. I believe this, if it refreshes your  
15 recollection, 1380 says, the Spangler management  
16 meeting minutes from April 23, that cease-and-desist  
17 letter was sent to Tootsie.

18 A. Okay. Yeah.

19 Q. So around April is when it was sent.

20 A. Yeah. So, I mean, I think we acted  
21 fairly quickly once we saw -- once we saw the picture,  
22 we acted, I think, very quickly.

23 Q. Who participates in the -- regularly in  
24 the management meetings?

1 Q. I just -- I think we were referring to  
2 earlier about Spangler launching a limited edition bag  
3 that hasn't been out yet that's -- that is comparable  
4 somewhat to the Summertime bag with new flavors,  
5 whatever else.

6 Is that the same --

7 A. That's the same thing, yes.

8 Q. Okay. And it would be the same for the  
9 limited edition high-count bag?

10 A. Yes.

11 Q. What's the Sour Smash item?

12 A. That's a non-round lollipop that we've  
13 been -- which is new.

14 Q. Is it sold today?

15 A. Yes.

16 Q. What's the DD C-store item?

17 A. Dum-Dums convenience store item.

18 Q. And what's MM C-store item?

19 A. Marshmallow Circuses Peanuts convenience  
20 store item.

21 Q. And Megastick is another convenience  
22 store item sold by Spangler?

23 A. Yes.

24 Q. Is there a particular reason why

1 A. The management meetings, there's about  
2 nine of use, and then we have a management -- that's  
3 on the second Monday of the month. That's what this  
4 particular meeting is.

5 And then we have a management senior  
6 staff meeting every fourth Monday of the month. And  
7 that senior staff meeting, it's a management meeting  
8 but it's with 30 other people, so that's the one that  
9 we have roughly 40.

10 Q. Who are the ones of the nine that attend  
11 the management meeting? Who are those nine?

12 A. It's myself and Bill and Evan Brock and  
13 Denny Gunther; and Lynn Wieland in our production  
14 area; and Steve Kerr in our production area; and  
15 Niki Mosier, who is in our human resources; and Ryan  
16 Miller, who is in logistics.

17 For the record, I think that was just  
18 eight. We added Matt Dixon, but it was after this  
19 meeting.

20 Q. Okay. Did -- on 3181, it talks under  
21 No. 1 about: "Providing information at the Candy Show  
22 to brokers on the strength of our Dum-Dums brand and  
23 the weakness of the Charms Mini brands over its many  
24 years in distribution."

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1 transparent windows on candy bags is relatively common  
2 in order to allow consumers to see the product inside  
3 the bag?  
4 **A. Yes.**  
5 Q. And you'd agree that the listing of the  
6 number of lollipops in the front of a bag provides  
7 information to the consumer about the number of pops.  
8 It's helpful to the consumer in his or her purchasing  
9 decisions.  
10 **A. Yes, particularly institutional**  
11 **customers.**  
12 Q. And Dum-Dums, as we saw earlier in that  
13 list of trademarks that you have, is a registered mark  
14 for many goods and services, right, in many different  
15 countries?  
16 **A. I'm sorry, ask me again the question.**  
17 Q. Sure. Just the name Dum-Dums is a  
18 registered trademark in the United States, right?  
19 **A. Correct.**  
20 Q. Okay. And it's registered for many  
21 different types of goods and services. In other  
22 words, I believe you -- I don't have them all here,  
23 but you have it registered for candy, and you might  
24 have it registered for certain clothing goods that you

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1 have promotionally, et cetera.  
2 **A. Okay. Yes.**  
3 Q. And you have it registered  
4 internationally, as well.  
5 **A. Yes. I don't know what countries. I**  
6 **know Canada is one of them.**  
7 Q. And every, all of Dum-Dums bags or  
8 packaging have the term "Dum-Dums" on them -- have the  
9 phrase "Dum-Dums" on it.  
10 **A. Yeah, I can't think of any that don't.**  
11 Q. Okay. And it's usually relatively  
12 prominent.  
13 **A. Yes.**  
14 Q. Has -- has Spangler ever done any  
15 valuations of its marks?  
16 **A. What do you mean?**  
17 Q. You know, there's the common phrase that  
18 Coca-Cola is the most valuable brand in the world, and  
19 if you just bought the brand --  
20 **A. Oh, I see.**  
21 Q. -- it would be worth 3 billion dollars  
22 or whatever?  
23 Have you done any valuation of Dum-Dums  
24 name for purposes of insurance or otherwise or

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1 whatever?  
2 **A. Not that I know of.**  
3 Q. Have you ever done any valuation of the  
4 alleged trade dress of the bag design?  
5 **A. No.**  
6 Q. You've never done that for purposes of  
7 obtaining financing or anything?  
8 **A. No.**  
9 Q. Have you ever -- in the past six years,  
10 has Spangler ever done any TV advertising for  
11 Dum-Dums?  
12 **A. No.**  
13 Q. Any radio advertising?  
14 **A. No.**  
15 Q. Do you do print advertising in  
16 magazines?  
17 **A. We have. Not a lot, but some.**  
18 Q. Do you know what the term "look-for  
19 advertising" is, know what it means?  
20 **A. No.**  
21 Q. Have you ever done any advertising which  
22 says, Look for the red bag to find Dum-Dums, or  
23 something like that?  
24 **A. I guess I'm not familiar with that.**

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1 Q. Sure. So there's some companies out  
2 there that will advertise and say, Look for this and  
3 you'll know you're going to get our product.  
4 Have you ever done any advertising that  
5 says, Look for the red bag?  
6 **A. No.**  
7 Q. Do you have any doubt that should  
8 Spangler succeed in this litigation and Tootsie Roll  
9 be ordered to pay damages that Tootsie would have the  
10 financial capacity to pay the damages?  
11 **A. You're asking me if -- yeah. Tootsie's**  
12 **a big -- a big company. I don't think that they'll --**  
13 **I don't think they'd have a problem paying the**  
14 **damages.**  
15 **Is that what you were asking?**  
16 Q. That is what I was asking. Thank you.  
17 Oh, going back to your declaration for a  
18 second, which was Exhibit 9.  
19 **A. Okay.**  
20 Q. It's the one with all the tabs on it.  
21 I'll grab it for you.  
22 **A. Okay. This is 8, is that --**  
23 Q. Did I say 9? Oh, that's 8, sorry.  
24 **A. Are you looking for 9?**

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1 Q. No -- yeah, we are looking for 9.  
2 I think we'll fix this later, because  
3 I'm actually looking for Exhibit F to your  
4 declaration --  
5 A. Okay.  
6 Q. -- which is here. I believe it was  
7 Exhibit 9, Exhibit F to Exhibit 9.  
8 And there we're looking at the images of  
9 the Charms Mini Pops on one side and the Dum-Dums on  
10 the other side there, correct?  
11 A. Yes.  
12 Q. And then on the Charms bag, you'll see  
13 above the 300, it says "Shop & Compare."  
14 Do you see that?  
15 A. Yes.  
16 Q. What effect, if any, do you believe that  
17 has on a consumer when shopping?  
18 A. I don't think much, because I don't  
19 think people, for the most part, read -- read that  
20 kind of small -- small print. I think also, compare  
21 to -- compare to what?  
22 Mini Pops are a good value in the sense  
23 that there is a lot of individual pieces, for the  
24 amount of money, that you get. So if I were a

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1 consumer, that's what I would think when I read that,  
2 that, you know, they're just comparing to the overall  
3 candy market.  
4 But I would argue most people are not  
5 going to see that.  
6 MR. STRAND: There is a number  
7 of documents I think we identified  
8 throughout this deposition that I believe  
9 exist that I'll follow up with you via a  
10 letter form to see if Spangler can find  
11 them.  
12 We may have some kind of follow-up  
13 that we can arrange, if necessary, for  
14 that. But otherwise, I have no further  
15 questions.  
16 MR. WICKLUND: Okay. I have  
17 nothing to add at this time.  
18 MR. STRAND: Thank you.  
19 MR. WICKLUND: Okay. And we will,  
20 of course, reserve.  
21 THE VIDEOGRAPHER: We are now  
22 going off the record. The time is 3:25  
23 p.m. This marks the end of the  
24 deposition.

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1 (Deposition concluded and witness  
2 excused at 3:25 p.m.)  
3 (Signature reserved.)  
4 ---  
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Page 208

1 SIGNATURE PAGE  
2  
3 Date of Deposition: October 12, 2018  
4 Correction page(s) enclosed? Yes\_\_\_\_ No\_\_\_\_  
5 How many correction pages?\_\_\_\_\_  
6  
7 KIRK VASHAW Date  
8 ---  
9  
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17 Please return this signed signature page along with  
18 correction page(s) to:  
19 COLLINS REPORTING SERVICE, INC.  
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22 (419) 255-1010  
23 Worksheet No. CS18-255  
24

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C E R T I F I C A T E

1  
2  
3 I, Casey G. Schreiner, a Notary Public in and  
4 for the State of Ohio, duly commissioned and  
5 qualified, do hereby certify that the within-named  
6 witness was by me first duly sworn to tell the truth,  
7 the whole truth, and nothing but the truth in the  
8 cause aforesaid; that the testimony then given was by  
9 me reduced to stenotype in the presence of said  
10 witness and afterwards transcribed; that the foregoing  
11 is a true and correct transcription of the testimony  
12 so given as aforesaid.

13 I do further certify that this deposition was  
14 taken at the time and place in the foregoing caption  
15 specified.

16 I do further certify that I am not a  
17 relative, employee of or attorney for any of the  
18 parties in this action; that I am not a relative or  
19 employee of an attorney of any of the parties in this  
20 action; that I am not financially interested in this  
21 action, nor am I or the court reporting firm with  
22 which I am affiliated under a contract as defined in  
23 the applicable civil rule.  
24

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1  
2 IN WITNESS WHEREOF, I have hereunto set  
3 my hand and affixed my seal of office at Toledo, Ohio  
4 on this 19th day of October, 2018.

5  
6  
7 CASEY G. SCHREINER, RMR-RDR  
8 Notary Public  
9 in and for the State of Ohio

10 My Commission expires December 26, 2021.  
11  
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## SIGNATURE PAGE

Date of Deposition: October 12, 2018

Correction page(s) enclosed? Yes ☒ No ☐How many correction pages? 1

KIRK VASHAW

10/29/18

Date

- - -

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